Re Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd

HIGH COURT (JOHORE BAHRU) - BANKRUPTCY NO 43-640 OF 1987
LC VOHRAH J
10 AUGUST 1989

Bankruptcy - Setting aside bankruptcy notice and subsequent proceedings - Application for - Wrong date of act of bankruptcy stated in petition - Whether bankruptcy petition bad in law - Bankruptcy Act 1967, s 97

Land Law - Foreclosure - Third party charge - Guarantee by company directors - Collateral security - Borrower defaulted in instalment payment - Order for sale - Postponement of auction sale

Banking - Personal guarantee by company directors - Third party charge - Borrower defaulted in instalment payments - Civil suit against guarantor - Whether lender should be estopped from proceeding against guarantor until after foreclosure proceeding - Whether civil suit against guarantor premature - No proper letter of demand to guarantors - Whether judgment properly obtained

This was an application by notice of motion by the judgment debtor ('the guarantor') for the bankruptcy notice and all subsequent proceedings thereto including the creditor's petition to be set aside or to be stayed under s 97 of the Bankruptcy Act 1967. By a letter of approval of a loan dated 30 October 1985 the judgment creditor ('the lender') approved a loan of $600,000 to the principal debtor, one Mah Kwai Ming ('the borrower'), upon the conditions, inter alia, that a third party charge be executed in favour of the lender in respect of land held under Malay Lease No 60 lot 2576 in the mukim of Senai-Kulai belonging to Kulai Jaya Sdn Bhd and that its directors provide personal guarantees to the lender. In consequence Kulai Jaya Sdn Bhd, as registered owner of 58889/62889 undivided share of the said land, executed a charge in favour of the lender, and the guarantor, as one of the directors, executed a guarantee agreement in favour of the lender. The borrower failed to make the instalment repayments in respect of the loan whereupon the lender filed an action against all the guarantors in Civil Suit No 313 of 1987 and on 4 April 1987 took out foreclosure proceedings against Kulai Jaya Sdn Bhd in Originating Summons No 388 of 1987 in respect of the said land. The lender obtained summary judgment in the civil suit for the sum of $650,227.98 together with interest and costs against the guarantor and the other guarantors on 8 July 1987 and an order for sale of the said land in the originating summons against Kulai Jaya Sdn Bhd on 16 March 1988. As a result of the final judgment obtained against the guarantor, a bankruptcy notice dated 10 September 1987 was served on the guarantor on 28 September 1987, and a creditor's petition dated 16 December 1987 alleging that an act of bankruptcy had been committed on 5 October 1987 was served on the guarantor on 26 February 1988. The guarantor filed the present application which was fixed for hearing at the same time as the petition.

The guarantor argued on three grounds. First, that since the guarantee agreement by virtue of cl 2 provided that the liability of the guarantors only arose when the proceeds of sale of the said land were insufficient to pay all moneys due to the lender by the borrower, the lender was estopped from proceeding against the guarantor after foreclosure of the said land in the originating summons. Second, that the civil suit was brought against the guarantor and the other guarantors prematurely as no proper letter of demand was sent to any of the guarantors so that the default judgment obtained therein was not proper and accordingly the bankruptcy proceedings based on that judgment should not be allowed. Third, as the petition wrongly stated that the act of bankruptcy occurred on a day which was one day before the event, the petition was bad in law, null and void and of no effect.

Held, dismissing the guarantor's application:

(1) The first contention called for an interpretation of the relevant provisions of the guarantee agreement. It was clear from the authorities submitted by counsel for the judgment creditor that where a loan has been secured by two collateral securities, one in the form of a charge and the other in the form of a guarantee, there is nothing to prevent the lender from proceeding against the guarantor instead of the chargor for realization of the debt. So whether any liability had arisen in the present application on the part of the guarantor depended really upon the terms of the guarantee agreement executed by the contracting parties. Clause 2 had to be read not in isolation but having regard to the rest of the provisions of the guarantee agreement, and the provisions of the guarantee agreement by virtue of cl 6 made it clear that the liability incurred by the guarantor was as principal debtor and not merely as surety. Accordingly there was no merit in the first ground.

(2) As regards the second ground, in the absence of any fraud, collusion, extortion or miscarriage of justice having been established, the validity of the final judgment could not be inquired into. In any event the guarantee agreement was quite unlike the usual standard guarantee document which specifically provides for an actual notice of demand to be sent to the guarantor before any liability can arise against him. Unless the guarantee provides otherwise, the liability of the guarantor arises when the principal debt becomes due. The guarantor will be liable from that date even if the banker does not inform him that the principal debt has become due and does not demand payment under the guarantee. There was therefore no merit in this second ground.

(3) With regard to the third ground, it was clear that the allegation of fact in para 4 of the petition that the act of bankruptcy was committed on 5 October 1987 was not quite correct as it took place only after midnight of that day. There was, however, no evidence that the guarantor attempted to pay up at any time before midnight of 5 October and to the court's mind, misstatement was merely a formal defect or irregularity which was remediable under s 131 of the Bankruptcy Act 1967 as obviously no injustice could be said to arise from it. Accordingly the third ground was without merit.

(4) A receiving order and an adjudication order was made against the guarantor as prayed in the petition with costs of the notice of the motion to be taxed. Similar orders were made against each of the judgment debtors in respect of the other three petitions in Bankruptcy Nos 43-639 of 1987, 43-652 of 1987 and 43-653 of 1987.

[*Editorial Note*: The applicant/judgment debtor has appealed to the Supreme Court vide Civil Appeal No 02-280 of 1989.]

Cases referred to

1 *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani* [1986] 1 MLJ 16 (refd)
2 *Malaysian International Merchant Bankers Bhd* v *G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471 (refd)
3 *Bank Bumiputra Malaysia Bhd* v *Doric Development Sdn Bhd & Ors* [1988] 1 MLJ 462 (refd)

4 *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (refd)
5 *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (refd)
6 *Re Majory* [1955] 1 Ch 600 (refd)
7 *Re Fraser* [1892] 2 QB 633 (refd)
8 *Re Davies* (1876) 3 Ch D 461 (refd)
9 *Re Flatau* (1888) 22 QBD 83 (refd)
10 *Sovereign General Insurance Sdn Bhd* v *Koh Tian Bee* [1988] 1 MLJ 304 (refd)
11 *Lesco Development Corp Sdn Bhd* v *Malaysia Building Society Bhd* [1988] 2 MLJ 184 (distd)

Legislation referred to
Bankruptcy Act 1967 ss 97, 131
Legal Profession (Practice and Etiquette) Rules 1978 r 22
Rules of the High Court 1980 O 14
Bankruptcy Act 1883 [UK] s 7

S Sagadeva for the applicant.
L Parthiban for the respondent.

Cur Adv Vult

LC Vohrah J: This was an application by way of notice of motion on the part of the judgment debtor ('the guarantor') for the bankruptcy notice and all subsequent proceedings thereto including the creditor's petition to be set aside or to be stayed under s 97 of the Bankruptcy Act 1967. It was agreed that the decision in the present application would bind similar applications in Bankruptcy Nos 43-639 of 1987, 43-652 of 1987 and 43-653 of 1987 as all four matters arose out of a loan transaction in which the four judgment debtors acted separately as guarantors.

The facts in so far as they are relevant to the present application are briefly as follows. By a letter of approval of a loan dated 30 October 1985 (see encl 14, exh A) the judgment creditor ('the lender') approved a loan of $600,000 to the principal debtor, one Mah Kwai Ming ('the borrower'), upon the conditions, inter alia, that a third party charge be executed in favour of the lender in respect of land held under Malay Lease No 60 lot 2576 in the mukim of Senai-Kulai belonging to Kulai Jaya Sdn Bhd and that its directors provide personal guarantees to the lender. In consequence Kulai Jaya Sdn Bhd, as registered owner of 58889/62889 undivided share of the said land, executed a charge on 16 November 1985 in favour of the lender and the guarantor as one of the directors executed a guarantee agreement dated 14 November 1985 in favour of the lender (see exh B, encl 14). The borrower failed to make the instalment repayments in respect of the loan, whereupon the lender on 2 March 1987 filed an action against all the guarantors in Civil Suit No 313 of 1987 and on 4 April 1987 took out foreclosure proceedings against Kulai Jaya Sdn Bhd in Originating Summons No 388 of 1987 in respect of the said land. The lender obtained summary judgment in the civil suit for the sum of $650,227.98 together with interest and costs against the guarantor' and the other guarantors on 8 July 1987 and an order for sale of the said land in the originating summons against Kulai Jaya Sdn Bhd on 16 March 1988. As a result of the final judgment obtained against the guarantor, a bankruptcy notice dated 10 September 1987 was served on the guarantor on 28 September 1987 and as no challenge was made to the bankruptcy notice, a creditor's petition dated 16 December 1987 alleging that an act of bankruptcy had been committed on 5 October 1987 was served on the guarantor on 26 February 1988. The guarantor did not file any notice disputing the truth of any of the statements in the petition three days before 6 June 1988, the date fixed for the hearing, as he was required to do if he wanted to contest. However, on 6 June 1988, before the hearing of the petition, the guarantor filed the present application which was taken cognizance of by the court and fixed for hearing on 7 September 1988 to be heard at the same time as the petition.

At the hearing of the present application on 7 September 1988, Mr Sagadeva advanced three grounds on behalf of the guarantor. First, that since the guarantee agreement by virtue of cl 2 provided that the liability of the guarantors only arose when the proceeds of sale of the said land were insufficient to pay all moneys due to the lender by the borrower, the lender was estopped from proceeding against the guarantor after foreclosure of the said land in the originating summons. Second, that the civil suit was brought against the guarantor and the other guarantors prematurely as no proper letter of demand was sent to any of the guarantors so that the default judgment obtained therein was not proper, and accordingly, the bankruptcy proceedings based on that judgment should not be allowed. Third, as the petition wrongly stated that the act of bankruptcy occurred on a day which was one day before the event, the petition was bad in law, null and void and of no effect.

The first contention called for an interpretation of the relevant provisions of the guarantee agreement regulating the guarantor's liability in case of default by the borrower. These provisions read:

> 1 The guarantor covenants with the lender that:
>
> (i) If the borrower shall in any respect fail to carry out the terms and conditions contained in the security document or shall commit any breach of his covenants or obligations thereunder then the guarantor shall indemnify the lender against all losses damages costs expenses and disbursements which may be made and incurred by the lender by reason of such failure or breach and without prejudice to the general indemnity contained above the guarantor shall make good any default by the borrower or his estate in the payment of the loan and of all interest, penalties and other payments which may be or become due under the provisions of the security document.
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> 2 In the event of the lender exercising its right of sale or assigning its rights in respect of the property pursuant to the security document then should the proceeds of such sale or assignment after deducting all the expenses thereof and incidental thereto (hereinafter called 'the net proceeds') be insufficient to pay all moneys due and owing to the lender by the borrower, the guarantor shall at the request of the lender

forthwith pay to the lender a sum representing the difference between the net proceeds and the moneys then due and owing to the lender.

...

6 Without prejudice to any right of the guarantor against the borrower as principal debtor, the guarantor as between himself and the lender shall be deemed to be a principal debtor and not merely a surety and accordingly shall not be discharged nor shall his liability be effected by any act thing omission or means whatever whereby his liability would not have been discharged if he had been a principal debtor and in particular (but not by way of limitation) the lender shall have the fullest liberty without affecting this guarantee to postpone for any time or from time to time the exercise of any of the powers conferred by the security document in the event of the borrower committing any default in complying with its terms and to exercise the same at any time and in any manner and either to enforce or forbear to enforce the covenants for payment of principal or interest or any other covenants agreements conditions or stipulations contained or implied in the security document or any other remedies or securities available to the lender and the guarantor shall not be released by any exercise by the lender of its liberty with reference to the matters aforesaid or any of them or by time being given to the borrower his personal representatives or assigns or by any variation in the provisions of the security document or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of releasing the guarantor.

It was submitted by Mr Sagadeva that cl 2 gave an option to the lender and that if it exercised that option by foreclosing on the said land then the liability of the guarantors did not arise unless the proceeds of sale were found to be insufficient to discharge the borrower's debt.

Mr Parthiban on behalf of the lender, in reply at the hearing, referred to three authorities, namely, *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani*,[1] *Malaysian International Merchant Bankers Bhd* v *G & C Securities Sdn Bhd & Anor*[2] and *Bank Bumiputra Malaysia Bhd* v *Doric Development Bhd & Ors*,[3] to counter Mr Sagadeva's submission and to support his own argument that the lender was entitled to proceed simultaneously under the charge and the guarantee document on the ground that they were merely collateral securities. Shortly after the hearing of the present application, Mr Parthiban quite properly under r 22 of the Legal Profession (Practice and Etiquette) Rules 1978 drew my attention to a fourth authority, *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors*.[4]

In *Esah*'s case,[1] which is a Supreme Court decision, the appellant bank lent money to the principal debtor and as security took a charge over the land belonging to the principal debtor and two others. The respondent was a guarantor for the loan. The principal debtor failed to pay the loan. The appellant bank took out foreclosure proceedings on the land but before the issuance of an order of sale, one of the owners died. The foreclosure was not proceeded with and instead the appellant bank took proceedings against the principal debtor and the respondent as surety. Judgment was entered against both and based on the judgment a bankruptcy notice was issued calling on the respondent to pay the amount owing. The respondent failed to do so. The appellant bank therefore filed a creditor's petition. The respondent filed a notice of intention to oppose the petition. The learned judge stayed the creditor's petition pending the decision of the petition against the principal debtor. The appellant bank appealed. Lee Hun Hoe CJ (Borneo) had this to say:

> By making the order of stay the learned judge appeared to think that the creditor should go against the principal debtor before going after the surety. 20 *Halsbury's Laws of England* (4th Ed) para 186 at p 101 under the heading 'Surety's Right to Compel Creditor to Collect Debt' provides:
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> 'After the guaranteed debt has become due, and before he has been asked to pay it, the surety may require the creditor to call upon the principal debtor to pay off the debt. In the absence of agreement the creditor is, however, not bound to sue the principal debtor before suing the surety. Moreover the surety, even where he deposits the amount of the guaranteed debt, cannot without such agreement compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay and expense which he thereby incurs, and, apparently, satisfies him that the principal debtor is solvent.'
>
> We appreciate the good intention of the learned judge in making the order of stay. Whatever the learned judge may think about the matter, we do not think, in the circumstances, he has the jurisdiction either to dismiss or to stay the creditor's petition.

In other words, *Esah*'s case[1] establishes the proposition that the guarantor in the absence of any agreement to that effect has no special right to demand that the creditor call upon the principal debtor to pay off his debt before calling upon the guarantor to pay up.

In the *G & C Securities* case,[2] the plaintiff bank had given a loan to G & C Securities, the first defendant. By way of security G & C Securities executed a charge in favour of the plaintiff bank. The money was required to carry out a project to build three bungalows on three lots of land. All the three lots were the subject of the charge. The director of G & C Securities, the other defendant, simultaneously executed a written guarantee for the repayment on demand of all sums owing by G & C Securities. The plaintiff bank sued G & C Securities and the director for repayment of the loan. It was contended for the defendants that since the bank could obtain a foreclosure order in a separate application it was not entitled to file the suit. Shankar J had this to say at p 472:

> I will now deal with the submissions made by defence counsel and the court's responses thereto. First it was submitted that the effect of art 11.03 of the charge was that the bank was obliged first to have the properties sold and only then was it entitled to sue the company or the guarantor for the balance. The defendants contended that since the bank could obtain a foreclosure order in a separate application they were not entitled to file this suit.
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> With respect to counsel for the defence I am unable to agree that art 11.03 of the charge imposes any such obligation upon

the bank. All that it says in simple language is that if the proceeds of the sale of the land were insufficient to settle the debt the company would continue to be liable to pay the balance still due. Article 10 of the charge imposed a liability on the company to pay the balance of the loan on demand together with the interest thereon. It is the opinion of this court that this contractual obligation could be enforced by direct action against the company. So far as the second defendant was concerned cl 3 of the guarantee provided that all moneys due from the company could nevertheless be recoverable from him as principal debtor, and cl 4 provided that the guarantee was in addition to and not in substitution for any other rights which the bank may have had under the charge. Clearly therefore it was open to the bank to proceed simultaneously against the second defendant as well.

The learned judge did not reproduce the provisions of the written guarantee that was executed by the director, but it is clear that he found, after examining the relevant provisions of the written agreement, that it had been contractually agreed between the plaintiff bank and the director that the former could recover the loan from the latter by instituting a direct action, without having first to resort to foreclosure proceedings on the charge.

In the case of *Doric Development Sdn Bhd*,[3] the bank had earlier sued Doric Development Sdn Bhd for moneys due on a banking account in respect of which the bank had granted an overdraft facility which was secured by a charge over certain land belonging to Doric Development Sdn Bhd, and additionally by a letter of guarantee executed by a guarantor. It was argued, inter alia, by the guarantor that the suit against her should be stayed because an order of sale by public auction had been obtained in an earlier originating summons apparently on the ground that it would be 'double recovery' by the bank. Peh Swee Chin J, however, had this to say:

> The Federal Court's decision in *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani* [1986] 1 MLJ 16 had made it abundantly clear, that, for the purpose of the instant case, in the absence of any express condition requiring that 'foreclosure proceedings' be proceeded with and completed first before suing the guarantor, the bank could not be compelled to sue the principal debtor, ie the company first. Such being the case, counsel's submission that *Esah bte Abdul Ghani*'s case was distinguishable from the instant case because of foreclosure proceedings not being proceeded with therein at all, could not possibly achieve the desired result intended by counsel.

In *Lim Kheng Kim*'s case,[4] the first defendant along with the other defendants had signed a joint and several guarantee in favour of the plaintiff in consideration of the plaintiff granting a loan to an incorporated company ('the borrower'). The loan was secured by a charge over the borrower's land. Eventually, the plaintiff commenced legal proceedings against the defendants in their capacity as sureties for the recovery of the debt. Although served with the writ of summons and statement of claim, the first defendant did not enter an appearance and so, on 18 March 1986, the plaintiff obtained judgment in default of appearance against him. On 7 November 1986, the first defendant was personally served with a bankruptcy notice and a copy of the default judgment. On 23 January 1987, his solicitors wrote stating that they had instructions to accept service of the creditor's petition. On 13 August 1987, when the bankruptcy petition came on for hearing, counsel for the first defendant informed the court that an application to set aside the judgment would be filed, but it was only on 9 February 1988 that the first defendant applied to have the judgment set aside on the grounds: (a) that the judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff; and (b) that in the alternative, if the judgment was regularly obtained, he had a good defence on the merits. As regards ground (b), it was contended, inter alia, that the guarantee was void and of no effect in that the first defendant had been induced to execute the same by misrepresentation on the part of the plaintiff that, notwithstanding the terms of the guarantee the plaintiff would only have recourse to the first defendant if, but only if, the plaintiff had to recover from the borrower the amounts outstanding following enforcement of the charge. With regard to this contention, it was held that the provisions of the guarantee as a whole were such that the plaintiff was not bound or required in law to realize the security before enforcing the guarantee.

It was clear from the above four authorities submitted by Mr Parthiban that where a loan has been secured by two collateral securities, one in the form of a charge and the other in the form of a guarantee, there is nothing to prevent the lender from proceeding against the guarantor instead of the chargor for realization of the debt. So whether any liability had arisen in the present application on the part of the guarantor depended really upon the terms of the guarantee agreement executed by the contracting parties, and bearing in mind the observations of Edgar Joseph Jr J in *Lim Kheng Kim*'s case,[4] I was of the considered view that cl 2 had to be read 'not in isolation but having regard to the rest of the provisions' of the guarantee agreement, and that the provisions of the guarantee agreement by virtue of cl 6 had made it clear that the liability incurred by the guarantor was as principal debtor and not merely as surety. I accordingly found no merit in the first ground.

As regards the second ground, it was argued that in the light of *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd*,[5] the letter of demand sent to the borrower with copies to the guarantors did not constitute a proper notice of demand to the guarantor as required under the law. The letter of demand to the borrower read:

> Ref: LP/Id/D/1287/87
> Date: 9 February 1987
>
> Mr Mah Kwai Ming
> No 11, Jalan Bunga Raya 5
> Taman Sri Kulai Baru
> 81000 Kulai

Dear Sir

Re: Notice of Demand

Claim for $650,227.98

We act for Equity Finance Corporation Berhad. We are instructed by our client that at your request our client granted you fixed loan facility, full particulars whereof have been furnished to you, and which terms and conditions you have had knowledge of. We are further instructed that you are in arrears of five (5) instalment payments and you have not made any effort to settle the same. We are further instructed that despite repeated demands you have failed and/or refused and/or neglected to settle the same. We are instructed to demand from you, which we hereby do, the settlement of the full outstanding balance of your loan amounting to $650,227.98 together with interest thereon at the rate of 22% pa calculated on a daily basis from 1 February 1987 to the date of full payment. Take notice that if you fail and/or refuse and/or neglect to pay our client or to us as solicitors for our client the aforesaid sum of $650,227.98 together with the interest as aforesaid from 1 February 1987 to the date of full payment and $100 costs within seven (7) days from the date hereof we have specific instructions to institute legal proceedings against you without further reference to you and in which event you will be liable for the legal costs incurred thereto.

Yours faithfully,
Sgd:

cc 1 Encik Tosrin bin Jarvanthi
No 1F, FELDA Taib Andak
81000 Kulai
2 Mr Chong Kei Hen
Batu 22, Jalan Sengkang
81000 Kulai
3 Encik Ibrahim bin Hanafiah
No M-170, Kampung Melayu
81000 Kulai
4 Mr Gan Bee Chok
No 200, Jalan Berlian
Taman Selatan
81000 Kulai
5 Kulai Jaya Sendirian Bhd
No 11, Jalan Bunga Raya 5
Taman Sri Kulai Baru
81000 Kulai

Take notice that under the terms of the guarantee agreement executed by you as guarantors, you did jointly and severally guarantee the due performance and observance by the said borrower of the stipulations and conditions of the abovesaid fixed loan facility.

cc Equity Finance Corp Bhd

It was an undisputed fact that the question of the propriety of the notice of demand was argued at length by counsel for the guarantor at the hearing of the application for summary judgment under O 14 of the Rules of the High Court 1980 but his argument was rejected by the senior assistant registrar when he gave summary judgment on 8 July 1987. No appeal was lodged against this judgment nor was there an application for stay of proceedings as a result of it. Mr Sagadeva, however, submitted that it was open to the court in the exercise of its bankruptcy jurisdiction to 'go behind' or 'go round' the judgment if there was evidence that it had been obtained by fraud or collusion, or that there had been some miscarriage of justice or if the bankruptcy proceedings amounted to an abuse of the process of the court. Mr Sagadeva referred to four authorities in support of his submission, namely, *Re Majory*,[6] *Re Fraser*,[7] *Re Davies*[8] and *Re Flatau*.[9] The relevant proposition that could be derived in *Majory*'s case,[6] as I saw it, was that 'while, in general, court proceedings, whether bankruptcy or otherwise, could not be used to obtain for a person some collateral advantage, and a party so using them would be guilty of abusing the process of the court, in bankruptcy proceedings the court would always look strictly at the conduct of the creditor using or threatening such proceedings, and if it concluded that he had acted oppressively the court would not hesitate to declare the creditor's conduct extortionate and would refuse to allow him to make use of the process'. *Fraser*'s case[7] was authority, to my mind, for the proposition that under s 7 of the English Bankruptcy Act 1883, the court at the instance of the judgment debtor could inquire whether there was ground for making a receiving order, although the judgment could not be set aside because the court in making a receiving order 'is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor'. *Davies*'s case[8] was, in my view, authority for the proposition that '[w]hen the court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed'. *Flatau*'s case[9] merely supported the proposition that '[t]he court of bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice'.

No affidavit had been filed on behalf of the guarantor to substantiate any of the grounds illustrated by these authorities as providing sufficient basis for the court to desist from making a receiving order upon the final judgment. In the case of *Sovereign General Insurance Sdn Bhd* v *Koh Tian Bee*,[10] Lee Hun Hoe CJ (Borneo) had this to say at p 305:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* (1893) 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under s 3(1)(i) of the Bankruptcy Act 1967, a

> debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. Having regard to these provisions, it was wrong for the learned judge to strike out the creditors' petition.

I took the view that in the absence of any fraud, collusion, extortion or miscarriage of justice having been established the validity of the final judgment could not be inquired into. In any event the guarantee agreement was quite unlike the usual standard guarantee document which specifically provides for an actual notice of demand to be sent to the guarantor before any liability can arise against him. It is stated in Sheldon and Fidler's *Practice and Law of Banking* (11th Ed) at p 309 that '[u]nless the guarantee provides otherwise, the liability of the guarantor arises when the principal debt becomes due. The guarantor will be liable from the date even if the banker does not inform him that the principal debt has become due and does not demand payment under the guarantee.' In the event, I did not think there was any merit in this second ground.

With regard to the third ground, it was clear that the allegation of fact in para 4 of the petition that the act of bankruptcy was committed on 5 October 1987 was not quite correct as it took place only after midnight of that day. There was, however, no evidence that the guarantor attempted to pay up at any time before midnight of 5 October and to my mind the misstatement was merely a formal defect or irregularity which was remediable under s 131 of the Bankruptcy Act 1967 as obviously no injustice could be said to arise from it. I accordingly found that the third ground was without merit.

By way of an extraneous ground, Mr Sagadeva advanced a subsidiary argument to the effect that there could be some oppression on the guarantor by the institution of the bankruptcy proceedings having regard to the judgment debtor's standing as a member of the Johore Executive Council and he asked the court to direct that the bankruptcy proceedings be stayed and that the lender pursue the foreclosure order for the sale of the said land and the recovery of the sum that was owed by the borrower. Mr Sagadeva drew my attention to s 97 of the Bankruptcy Act which reads:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

This provision, I considered, gave a protective role to the court to exercise its discretion to stay proceedings if it felt, inter alia, that undue hardship might be caused to a judgment debtor. In the circumstances, as foreclosure proceedings were already afoot, I made an order on 16 February 1989 in terms of the alternative prayer for all further proceedings subsequent to the issue of the bankruptcy notice and the creditor's petition to be stayed for three months with effect from that date pending the judicial sale of the said land with liberty to the lender to apply if the sale should prove abortive. As the first two grounds of the present application were also contained in the applications in Bankruptcy Nos 43-639 of 1987, and 43-652 of 1987, I made similar orders in respect of these applications. With regard to the application in Bankruptcy No 43-653 of 1987, Mrs Ong Peck Ha, who appeared as counsel for the judgment debtor therein, cited *Lesco Development Corp Sdn Bhd* v *Malaysia Building Society Bhd*[11] in arguing that the lender's petition ought either to be struck out or stayed on the ground that her authority showed that it was quite undesirable to allow a situation to prevail where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. *Lesco*'s case,[11] in my view, is authority only for the proposition that where there was still pending an application by the appellant to set aside a judgment obtained by the respondent in default of appearance in a claim on a debt in one court, the respondent ought not to obtain an order for the sale of the appellant's land charged to it in a foreclosure action in another court until after the final disposal of the claim on the debt. In the result, for the reasons I had given in rejecting Mr Sagadeva's arguments, I made a similar order for stay in respect of the application in Bankruptcy No 43 - 653 of 1987.

As the judicial sale fixed for 16 April 1989 proved abortive, Mr Parthiban by letter dated 2 June 1989 applied for the petition to be set down for hearing. When the petition was heard on 18 July 1989, Mr Parthiban prayed for a receiving order to be made on the petition. Mr Sagadeva on the other hand asked the court in its discretion to direct either the lender or the guarantor to make an application to the senior assistant registrar for the reduction of the reserve price so that another attempt could be made for the public auction of the said land. Mr Sagadeva's request in the present petition applied also to the petitions in Bankruptcy Nos 43-639 of 1987 and 43-652 of 1987. Mr Ong Chee Yong, counsel for the judgment debtor in the petition in Bankruptcy No 43-653 of 1987, supported Mr Sagadeva's request. Mr Parthiban objected to any further postponement of the making of appropriate orders on the petition on the grounds: (1) that it would cause injustice to the lender, having obtained final judgment in July 1987, to have to wait any longer in order to enforce the judgment; (2) that the judgment sum was continuing to accumulate interest; (3) that two unsuccessful attempts had already been made by the lender for the judicial sale of the said land; (4) that the market conditions

for real property transactions had improved considerably so as to obviate any call for further reduction of the reserve price and in any event no evidence had been furnished to indicate that the said land was worth less than the reserve price; and (5) that more than enough time had been granted to the guarantor to settle the debt since the act of bankruptcy. As I had rejected all the grounds put forward by Mr Sagadeva and Mrs Ong Peck Ha in their contentions that the creditor's petitions ought to be set aside, I was of the view that Mr Parthiban had established good grounds for the court to disallow any further postponement of the making of the receiving order as more than sufficient opportunity had been given to the parties affected to settle the debt. I accordingly made a receiving and adjudication order against the guarantor as prayed in the petition with costs of the notice of the motion to be taxed. I had accordingly to make similar orders against each of the judgment debtors in respect of the other three petitions in Bankruptcy Nos 43-639 of 1987, 43-652 of 1987 and 43-653 of 1987.

Order accordingly.

Solicitors: *Yee & Saga; L Parthiban & Associates.*

Reported by *Wong Kim Fatt*

Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor

Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor

HIGH COURT (JOHORE BAHRU) - CIVIL SUIT NOS 23-598-1985 AND 22-1020-1985
MOHAMED YUSOFF J
5 AUGUST 1989

Legal Profession - Solicitors - Retainer of solicitor - Proof of retainer - Duty of care and skill of solicitors - Solicitors acting for more than one party in transaction - Conflict of interests of parties and solicitors' obligations to them - Solicitor as stakeholder - Duty of solicitor

Tort - Fraud - Negligence - Professional negligence - Loan transaction - Charge over land as security - Solicitors acting for lender, borrower and chargor - Lender a victim of solicitors' previous misdeed - Solicitor in breach of undertaking to repay money to lender - Loan moneys released to solicitors - Solicitors using part of loan to rectify breach of undertaking to lender - Borrower suffering loss - Whether lender and solicitors guilty of fraud and collusion

The above two actions were consolidated and tried together. The plaintiff in the first action, Dato' Seri Au Ba Chi, sought various remedies against the defendants in regard to a transaction in which a loan of $3,000,000 was granted by the first defendants to the plaintiff in the second action, Dato' Au Development Sdn Bhd. In the second action, Dato' Au Development Sdn Bhd sought remedies against the same defendants as in the first action in regard to the same transaction.

Dato' Au was the owner of 51 pieces of land which he had charged to the first defendant as security for the loan. The loan was disbursed through the second defendant which was a firm of solicitors acting for the first defendants. It was alleged that the second defendant, without the knowledge of the plaintiffs, had released to a company, Kim Hiong Realty Sdn Bhd, the sum of $500,000 being part of the money lent and converted the same to the use of the first and/or the second defendants.

Upon approval of the loan by the first defendant, the second defendant had requested the release of the sum of $3,000,000 to itself as stakeholder and gave an undertaking to refund the whole sum in the event that legal charges over the lands were not registered. The money was released by the first defendant to the second defendant on 25 June 1983. The charge documents, although executed by the parties concerned, were not presented for registration until 20 August 1983. By that time, the second defendant had released the sum of $2,167,088.78 to Dato' Au Development Sdn Bhd and the sum of $500,000 to Kim Hiong Realty Sdn Bhd. The second defendant alleged that the sum of $500,000 was released on the instructions of Dato' Au, an allegation which was denied by the plaintiffs.

The second defendant alleged that, on the instructions of Kim Hiong Realty Sdn Bhd, out of this sum, it paid the sum of $300,000 to the first defendant so as to settle a debt in the sum of $300,000 owing by a company, Chuan Hin Trading Sdn Bhd, to the first defendant. There was evidence that in regard to this sum, the second defendant had been in breach of an undertaking to pay the sum to the first defendant since 1982.

Held, allowing the plaintiffs' claim:

(1) Generally the duty of a stakeholder is to hold the stake in medio pending the outcome of a future event; he holds it as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands. This was the position the second defendant held itself out to be in when the money was released to it.

(2) There is no legal requirement for a retainer of solicitors to be in writing. There was sufficient evidence to show that the conduct of the parties intended that the relationship of solicitor and client was to continue to exist between the second defendant and the plaintiffs from their earlier dealings. In the circumstances, a retainer was established between the second defendant and the plaintiffs.

(3) The duty derived from this retainer and imposed on the second defendant was to disburse the loan of $3,000,000 in full to Dato' Au Development Sdn Bhd and this was to be done upon completion of the security documents.

(4) The second defendant had breached its undertaking to the first defendant and its obligations to the plaintiffs. It had acted for more than one client whose interests directly conflicted with its obligations to the plaintiffs. It had the onus of proving that the conflicting interests did not prevent it from doing its duty to both clients.

(5) Under the general law, the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do.

(6) The second defendant was given the knowledge that the loan was to be utilized for the plaintiffs' housing project and that full release of the loan was important to the plaintiffs. The period of the loan was also specified to be 24 months during which time the housing project was expected to be completed. It could be